Davis Wright Tremaine LLP

Suite 800
505 Montgomery Street
San Francisco, CA 94111-6533

Thomas R. Burke
(415) 276-6552 tel
(415) 276-6559 fax

thomasburke@dwt.com

August 12, 2013

Via FedEx and E-mail

Dr. Cathy Washer, Superintendent
Ralph Womack, Board President
Joe Nava, Board Vice President
George Neely, Board Clerk
Ruth Davis, Board Member
Ron Heberle, Board Member
Bonnie Cassel, Board Member
Ron Freitas, Board Member
Lodi Unified School District
1305 E. Vine Street
Lodi, CA 95240

Re: **Policy On Social Networking By Student-Athletes and Co-curricular Participants**

Dear Superintendent Washer and Board Members Womack, Nava, Neely, Davis, Heberle, Cassel, and Freitas:

We write on behalf of the Student Press Law Center ("SPLC"), a national nonprofit organization dedicated to educating high school and college students about the First Amendment and supporting students in opposing censorship, and the American Civil Liberties Union of Northern California ("ACLU-NC"). We urge the District to immediately suspend its policy on Social Networking By Student Athletes and Co-curricular Participants (the "Policy"), which violates federal and state law and infringes on students' fundamental constitutional rights.

The Policy has generated widespread protests from students and parents rightfully concerned about its stifling effect on students' free speech. While the Policy may be a well-intentioned effort to discourage bullying, it sweeps far too broadly and impermissibly has the Government acting as a 24-hour a day censor of student speech. As currently written, the Policy applies to virtually all online communications by District students, regardless of whether they occur off campus or after school hours. It reaches beyond constitutionally unprotected and unlawful behavior and proscribes extremely broad classes of speech, such as "demeaning statements," "language in reference to violence, drug or alcohol use, [or] bullying," and any expression deemed "inappropriate" by school officials. By conditioning students' ability to participate in extracurricular activities on their submission to such a draconian and

constitutionally infirm speech code, the District is violating clearly established federal and state law in several fundamental ways.

First, the Policy fails to withstand the most basic First Amendment scrutiny. The incredibly broad categories of prohibited speech under the Policy clearly encompass legitimate political and social criticism that enjoys protection under the First Amendment and California's Constitution. For example, the law has been clear for half a century that "demeaning statements" about public figures and government officials enjoy full constitutional protection. *See, e.g.*, *Hustler Magazine v. Falwell*, 485 U.S. 46, 50 (1988) (offensive parody of public figure protected by First Amendment); *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) ("debate on public issues should be uninhibited, robust, and wide-open, and ... may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."). As the Supreme Court recently reiterated, even where speech "inflict[s] great pain," the government "cannot react to that pain by punishing the speaker" because "[a]s a Nation we have chosen a different course--to protect even hurtful speech on public issues to ensure that we do not stifle public debate." *Snyder v. Phelps*, 131 S. Ct. 1207, 1220 (2011).

The Policy purports to bar "language in reference to violence, drug or alcohol use, bullying, or any other inappropriate behaviors." By its plain terms this language precludes students from engaging in any sort of online speech examining bullying, violence, and drug or alcohol abuse – even speech *condemning* such conduct – without the threat of post-facto censorship by the District. The Policy also categorically bars students from "liking," "retweeting," or "favoriting" other peoples' "inappropriate" online posts regardless of whether they are highlighting the third-party speech in order to endorse or criticize it. Of course, when a student "likes" or "retweets" or "favorites" other peoples' "inappropriate" online posts, though they are engaging in protected speech activity, such actions do not necessarily indicate complete agreement with another's particular opinion or position. Indeed, a recent study concluded that such highlighting of another's Internet posting does not necessarily correlate with approval of its content; rather, crowd dynamics make "liking" far more common than expressing disapproval. *See* Kenneth Chang, "'Like' This Article Online? Your Friends Will Probably Approve, Too, Scientists Say," N.Y. Times (Aug. 8, 2013). These exceedingly broad prohibitions run afoul of the vagueness and overbreadth doctrines, which ensure that regulations of speech are "carefully drawn or ... authoritatively construed to punish only unprotected speech and not be susceptible of application to protected expression." *Gooding v. Wilson*, 405 U.S. 518, 522 (1972).

Along these same lines, the Policy also violates the First Amendment by giving school officials unfettered discretion to determine if students' speech – even speech taking place off campus and having no connection to school business – is "inappropriate," and thus subject to sanction. *See Forsyth County v. Nationalist Movement*, 505 U.S. 123, 133 (1992) (holding unconstitutional an "ordinance [that] contains more than the possibility of censorship through

uncontrolled discretion"). As the Supreme Court has famously said, students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *See Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969). Moreover, when "school officials venture[] out of the school yard and into the general community where the freedom accorded expression is at its zenith, their actions must be evaluated by the principles that bind government officials in the public arena." *Thomas v. Bd. Of Educ., Granville Central School Dist.*, 607 F.2d 1043, 1050 (2d Cir. 1979); *see also Saxe v. State College Area School Dist.*, 240 F.3d 200, 216 n. 11 (3d Cir. 2001) (if school's anti-harassment policy interpreted to apply off-campus, it "would raise additional constitutional questions"); *Nuxoll v. Indian Prairie School Dist.*, 523 F.3d 668, 674 (7th Cir. 2008) (permissible school rule prohibiting derogatory comments "probably would not wash if it were extended to students when they are outside of the school, where students who would be hurt by the remarks could avoid exposure to them"). The California Constitution and state laws, meanwhile, go even farther than the First Amendment in protecting students' expressive activities both on and off campus. *See, e.g., Leeb v. Delong*, 198 Cal. App. 3d 47, 54 (1988); *Los Angeles Alliance for Survival v. City of Los Angeles*, 22 Cal. 4th 352, 366 (2000) ("the California liberty of speech clause is broader and more protective than the free speech clause of the First Amendment.").

It is immaterial that the Policy restricts speech as a condition of participation in extracurricular activities. The Supreme Court has made clear that "the Government may not deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech even if he has no entitlement to that benefit." *Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc.*, 133 S. Ct. 2321, 2328 (2013) (quotation omitted). California provides even stronger protection against such unconstitutional conditions on speech. *See Committee to Defend Reproductive Rights v. Myers*, 29 Cal. 3d 252, 266-68 (1981). State courts have applied this principle "in a wide variety of factual settings," including where "the public benefit program at issue is access to a public forum, public employment, welfare benefits, public housing, unemployment benefits or the use of public property." *Id.* at 264. They would surely apply it here, where the benefit is access to extracurricular activities, which the California Supreme Court has deemed "an integral component of public education" protected by the free school guarantee of the state Constitution. *Hartzell v. Connell*, 35 Cal. 3d 899, 909 (1984).

It is further immaterial that the penalty for violating the Policy is "only" suspension from participation in extracurricular activities. The Ninth Circuit U.S. Court of Appeals has expressly held that removal from an athletic team as punishment for non-disruptive speech is a violation of the First Amendment. *See Pinard v. Clatskanie Sch. Dist.*, 467 F.3d 755 (9th Cir. 2006) (school district violated players' constitutional rights by suspending them from basketball team because they petitioned for the removal of their coach and met with the principal to complain about him). If student-athletes are entitled to the full benefit of *Tinker* protection even when they speak on

campus in their student-athlete roles, they most assuredly are entitled to at least that much protection when using their families' home computer and Internet service.

Second, the Policy squarely violates California Education Code Section 48907, which protects student speech at school, and Section 48950, which prohibits school districts from punishing students based on expression that would be constitutionally protected outside of campus. In stark contrast to the Policy, these statutes have extremely narrow, well-delineated exceptions that *only* apply to speech that lacks constitutional protection. Section 48950 carves out "harassment, threats, or intimidation, *unless constitutionally protected*." *Id.* at § 48950(d) (emphasis added). Section 48907 directly tracks the Supreme Court's First Amendment jurisprudence in only excluding speech that is "obscene, libelous, or slanderous" or that amounts to incitement to violence. *Id.* at § 48907(a). Courts have strictly interpreted these statutes to ensure that any proscribed speech is not entitled to constitutional protection. *See, e.g., Leeb*, 198 Cal. App. 3d at 62.

These statutes reach beyond direct disciplinary actions and prohibit school district policies that have the effect of restricting protected student speech. Thus, in *Smith v. Novato Unified School District,* 150 Cal. App. 4th 1439 (2007), the appellate court held that even though a school district did not formally discipline a student over a "disrespectful and unsophisticated" editorial on immigration published in the school newspaper, it nonetheless violated state law by simply announcing that the editorial should not have been published and ordering the remaining issues of the newspaper to be retracted. *See id.* at 1458, 1462. "[T]he threat of censorship implicit" in the District's conduct, the court found, "is a legally cognizable harm." *See id.* Similarly, California's Attorney General has explained that "school administrators may not require written parental permission before allowing members of the news media to interview students," because such a policy "would violate the underlying purpose of section 48950," and "would constitute ... an impermissible prior restraint" under § 48907. *See* 79 Ops. Cal. Atty. Gen. 58, 67-69 (1996). The Policy is similarly invalid, as it contradicts the purpose of these laws while placing a prior restraint on students' constitutionally protected online speech.

Third, the Policy raises serious concerns about the deprivation of students' due process rights. The California Supreme Court has recognized "the vital importance of student participation in educational extracurricular programs." *Hartzell*, 35 Cal. 3d at 909. "[S]chool-sponsored activities, such as sports, drama, and the like, though denominated 'extracurricular,' ... nevertheless form an integral and vital part of the educational program." *Id.* at 910 (quotations omitted). Therefore, the Court held that "all educational activities -- curricular or 'extracurricular' -- offered to students by school districts fall within the free school guarantee of article IX, section 5" of the state Constitution. *Id.* at 911. *See also Cal. Ass'n for Safety Education v. Brown*, 30 Cal. App. 4th 1264, 1277-78 (1994) (emphasizing that extracurricular activities are protected by the constitutional free school guarantee).

The Policy deprives students of their constitutionally guaranteed free access to extracurricular activities unless they submit to vague, overly broad restrictions on their speech. The Supreme Court recently struck down vague administrative orders restricting speech, holding that they violated the Due Process Clause of the Fifth Amendment. *See FCC v. Fox TV Stations, Inc.*, 132 S. Ct. 2307, 2318 (2012). The Court explained that, as in the First Amendment context, the due process vagueness doctrine ensures "that regulated parties should know what is required of them so they may act accordingly," while requiring "precision and guidance ... so that those enforcing the law do not act in an arbitrary or discriminatory way." *Id.* "When speech is involved, rigorous adherence to those requirements is necessary to ensure that ambiguity does not chill protected speech." *Id.* Because the Policy chills protected speech without providing any such guidance, and because students have no choice but to accept its restrictions or lose the right to participate in extracurricular activities, the Policy abridges students' right to due process.

For all of the foregoing reasons, the Policy the District has enacted is legally invalid and should be immediately suspended. As an institution devoted to the education of young minds, the District should not be ignorant of these settled constitutional principles and place its students in a position of having to choose between participating in extracurricular activities or giving up their freedom of speech. The harm to students' First Amendment rights is compounded with each day that the Policy remains in effect. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("[t]he loss of First Amendment rights, for even minimal periods of time, unquestionably constitutes irreparable injury."). Because of the Policy's glaring constitutional infirmities and clear conflict with state and federal law, if litigation becomes necessary, a court is highly likely to invalidate the Policy and to hold those responsible for its enforcement personally financially liable for violating clearly established law. The challengers would then be entitled to seek recovery of their attorneys' fees from the District pursuant to 42 U.S.C. § 1988 and California Education Code § 48950(b).

We hope such legal action is unnecessary. Press reports indicate that two District trustees have acknowledged certain flaws in the Policy and invited students to help clarify it. *See* Ross Farrow, "Two Lodi Unified School District trustees ask for student input on social networking policy," Lodi News-Sentinel (Aug. 7, 2013). This is an encouraging development, but as long as the Policy remains in effect protected speech is being impermissibly chilled and students are suffering concrete First Amendment harm. We therefore strongly urge the District to immediately stop enforcing the Policy while it decides whether the Policy needs to be revised, or whether it is needed at all. We look forward to your prompt review of this very serious matter.

Should you wish to discuss this matter, I may be contacted via email at thomasburke@dwt.com or (415) 276-6552.

Sincerely,
Davis Wright Tremaine LLP

Thomas R. Burke TDL

Thomas R. Burke

cc: Frank D. LoMonte, Executive Director, Student Press Law Center
Linda Lye, Staff Attorney, ACLU of Northern California
Ross Farrow, Lodi News-Sentinel
Roger Phillips & Keith Reed, Stockton Record
Loretta Kalb, Sacramento Bee
Claire Doan, KCRA-TV
Tim Daly, News10/KXTV
Marin Austin, Fox40
News Desk, CBS 13
News Desk, CBS 47